NO. 11583

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

BENJAMIN N. WILHITE,

Appellee.

BRIEF OF APPELLANT UNITED STATES OF AMERICA

Upon Appeal from the District Court of the United States for the District of Oregon.

HENRY L. HESS,
U. S. District Attorney,
VICTOR HARR,
Assistant U. S. Attorney,
U. S. Court House,
Portland, Oregon;
WOOD, MATTHIESSEN & WOOD,
ERSKINE WOOD,
ERSKINE B. WOOD,
LOFTON L. TATUM,
Proctors for Appellant,
1310 Yeon Building,
Portland 4, Oregon.

TANNER & CLARK,
EDWARD J. CLARK,
Proctors for Appellee,
1041 Pacific Bldg.,
Portland 4, Oregon.

STEVENS-NESS LAW PUB CO., PORTLAND

SUBJECT INDEX

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STATEMENT OF CASE

This is an admiralty appeal. If it depended on disputed questions of fact, it would not have been taken. But it does not so depend. It involves the simple question whether the trial judge drew the proper conclusions from the undisputed facts. He concluded that the respondent had negligently caused libelant's injuries, and that $2500 was a proper award of damages, and that

libelant was not guilty of contributory negligence. We contend, on the contrary, that he should have concluded (1) that respondent was not negligent; (2) that even if it were, libelant was contributorily negligent; and (3) that $2500 was too much.

Whether the trial court was right or wrong depends on an answer to this question: Can a ship's carpenter, who, in broad daylight, and without looking where he is going, bumps his head on a fog buoy suspended horizontally under the gun platform of a ship, leaving nearly 6 feet of headroom, collect $2500 damages? Especially when the only doctor who testified said that he did not think libelant's present symptoms of headache, etc., proceeded from the injury?

THE FACTS

The facts are quite simple. The ship was a Liberty ship. Wilhite was the carpenter. The after deck space on a Liberty ship is 18 feet fore and aft from the after deck house to the bulwark rail at the stern, and approximately 30 feet wide athwartships. This is all clear deck space. On top of the after deckhouse is a gun platform, and this extends 10 feet aft over the deck space just described and about 7 feet above it. This projecting gun platform is supported by angle iron 6-inch beams. The clearance between those beams and the deck beneath is 6 feet, 11 inches, or, say, 7 feet. It was the custom during the war to carry "fog buoys" to be trailed behind a ship in thick weather to enable the following ship, in convoy, to keep her position. These fog buoys

were not all exactly alike, but were often wooden beams approximately 6 by 6 inches, and of varying lengths, with a spike, or something of that nature, driven through the end of them to create a wake when dragged through the water. These, when not in use, were carried at convenient places about the ship, and on this particular ship there were two of them, and they were lashed beneath the projecting gun platform described. No one denies the propriety of this.

At the time of the accident to Wilhite one of these fog buoys had been slightly lowered in its lashings so that some life rings could be suspended from it to enable a couple of sailors to paint them. When so lowered the fog buoy was not quite 6 feet above the deck, according to Wilhite, who says that he is 5 feet, 11 inches tall, and that if he had been walking erect he would have bumped his forehead against it. (Ap. 71). The place between the gun platform, where the fog buoys were suspended, was admittedly a proper place to keep them, and the deck beneath it was not a passageway, but was merely a part of the whole open deck space before described, i.e., 18 feet long by 30 feet wide. The only evidence of the accident at all is the testimony of Gill, the bos'n, and of Wilhite himself. As they do not substantially differ, we summarize that of Wilhite. He says that he was doing some work on the deck aft, port side, and received an order from the mate, transmitted by a sailor, to hurry forward and attend to the anchor. He started across the deck to the starboard side, passing beneath the fog buoy and through an opening about 30 inches to 3½ feet wide between the suspended life rings,

and, observing the life rings, but not the fog buoy, bumped the top, or, as he sometimes describes it, "the back" of his head against it. He slightly staggered, but was not knocked down or made unconscious, and went forward on his errand amid the laughter of the sailors and the bos'n. He admits that he did not look where he was going, but says "I was looking down because there was something lying on the deck I had to step over", and that "In fact when I walk I look down all the time. I hardly ever look up. I am a great hand to look where I am stepping". The significant portions of his testimony are:—

"Q. Now, you saw these sailors painting the life rings there, did you?

A. I don't believe they were painting during that time. They might have been.

Q. What were they doing, Hanging them up?

A. They were already hung up.

Q. You saw that?

A. Yes, I remember seeing the life rings up.

Q. And when you got this order to go forward to the anchor, just tell us again how you walked or what you did. You said you didn't run. You walked, didn't you?

A. Well, I always walked at a good, stiff walk. I never was slow at walking.

Q. And did you look where you were going?

A. I was looking down, because there was something laying on the deck I had to step over.

Q. What was it?

A. I don't remember what it was. There was something laying there on the deck, right below the life rings. There was a lot of litter on the deck. They generally clean them up after they get to sea.

Q. Well, now, what was it? Was it litter, or was it a pipe, or what was it?

A. Well, I don't remember. I couldn't say. I

just don't remember what it was.

Q. And how many steps had you taken before you hit your head? Approximately, I mean?

A. Oh, three or four, something like that.

Q. And did you stoop to go under this thing?

A. No. I generally walk pretty straight, but you wore a seaman's cap, you know—I always wore a seaman's cap.

Q. You didn't stoop to go under it?

A. No; I never walk with a stoop.

Q. I didn't mean habitually. I mean you didn't duck your head to go under it? A. No.

Q. You saw the life rings hanging there?

A. Yes, sir, that is right. There was a space between the life rings. They left it there.

Q. What do you suppose they were hanging from?

A. I don't know that I noticed. In fact, when I walk I look down all the time. I hardly ever look up. I am a great hand to look where I am stepping.

Q. As you approached the fog buoy and the life rings you took your hands to part the rings, didn't you, so you wouldn't get paint on you, didn't you?

A. No; there was a space, I would say, about that wide, a passageway through.

Q. You didn't do anything to the life rings to keep from getting paint on you? A. No.

Q. And you didn't duck your head?

A. No.

Q. And you walked straight forward?

A. Well, I generally do. I don't just remember what position——

Q. And you didn't stoop?

A. No.

Q. Well, how did you hit the back of your head?

A. Just the top of it, like that (indicating). You see, the bottom was lashed down on the forward end of it. The forward end of it was laying on a vent that comes from a toilet on the stern of the ship. That is where the soldiers or the Navy crew stay, and that was laying on top of that. One

end was lower, you see, than the other.

Q. One end was what?

A. One end was lower. It was kind of on a slope, you see.

Q. You mean the forward end was lower?

A. That is right.

Q. And is that the end you hit on?

A. That is right.

Q. How tall are you?

A. I am five feet eleven and a half inches.

Q. Five feet eleven and a half inches; so, without stooping, and walking erect, you just barely hit the top of your head, is that it?

A. Well, it hit me enough to stagger me quite a bit." (Ap. 66-69).

He also said it happened in the "forenoon", (Ap. 71) and that the seamen and the bos'n laughed about it (Ap. 71), and that if he had been walking perfectly straight it would have hit him on the forehead. (Ap. 71).

On his deposition given before trial he testified that the accident happened at 4:30 in the afternoon, and that as he went between the life rings he was "parting them so I wouldn't get paint on me, see." (Ap. 107). This last he denied at the trial. (Ap. 68).

These are the simple facts from which the trial judge concluded that Wilhite was in no way negligent, and that the respondent was.

This brings us to the

FIRST SPECIFICATION OF ERROR

The trial court erred in holding the respondent liable at all in damages. (First Assignment of Error, Ap. 19).

It does not seem to us that this requires much argument because the thing seems palpable. The man was not even passing through a passageway. He was passing across an open deck. It was much as if a man walking along the street should bump into a lightpole on the curb and then sue for damages. It is not disputed that beneath the gun patform was a proper place to stow the fog buoys. The only claim is that because one of them had been slightly lowered, there was not sufficient headroom, although it is admitted that the headroom was nearly 6 feet. It was not dark. It was broad daylight and Wilhite saw the life rings suspended there and must have known that they could only be suspended from one of the buoys, and that the natural thing would be to lower the buoy a little to get the lashings over it. The charge in the libel is that the "timber" was not "lashed at a height which would permit libelant to pass thereunder without collision therewith". (Ap. 4). But it *would* "permit" him to pass. All he had to do was bend over a little. What any man would do. We submit that almost 6 feet of headroom is plenty for any sailor who knows what he is about and looks where he is going, especially when the space is not a confined passageway but an open deck.

The bos'n who was right there and saw the whole arrangement did not at that time think it was negligent, although he testified for Wilhite on the trial. But although he was in charge of the work, it never occurred to him at the time to do anything about it. There is no suggestion that he was not a competent man, and if negligence is the failure to use the care of an ordinarily

careful man, here we have a supposedly ordinarily careful man sanctioning what was going on.

The trial court, in the course of his remarks during the short oral argument, asked: "Isn't the testimony uncontradicted here that the proper way to lash these beams was to lash them in such a way that there would be a 7-foot clearance?" (Ap. 117). Libelant's counsel, to whom the question was addressed, did not answer it. But the question intimates a confusion in the judge's mind. There was no such "uncontradicted testimony". All the testimony there was on that point is the following:—

Loren Carlsen, a ship's master (but not of this ship), friend of Wilhite, testifying for him, said that these fog buoys are lashed in any convenient place, and that when lashed under a gun platform they could be lashed right up "against the ceiling", "but not necessarily" (Ap. 32), and that "I mean by that that there's so many places that you could stow a thing on a ship, but if you did lash anything you would lash it in the clear and leave a passageway for someone. That is the general idea." (Ap. 32-3). And "Well, I would say any place in the stern that is frequented by the crew, even if there was a good six-foot-six clearance it wouldn't be safe, because a tall person walking aft *in the dark* would possibly injure himself." (Ap. 33). The Court will surely not overlook "in the dark".

Gill, the bos'n, and also a friend of Wilhite, testified only that the clearance between the channel iron and the deck was about 7 feet (Ap. 42), and that the fog

buoy had been lowered about 6 or 8 inches (Ap. 40), and that the then clearance between it and the deck was "about 6 feet or a little less". But he nowhere said that this was not enough.

Wilhite nowhere testified that the clearance was improper.

Neither did Constantine George, libelant's other witness.

Neither did Captain Childs, respondent's witness who testified that beneath the gun platform was a proper place to suspend the life rings from the fog buoys for the purpose of painting them. (Ap. 102-3). Neither did Mr. Nyborg, respondent's other witness, although an answer he gave may have lead to the judge's apparent misapprehension when he asked the question: "Isn't the testimony uncontradicted here that the proper way to lash these beams is to lash them in such a way that there would be a 7-foot clearance?" Mr. Nyborg was a naval architect who was called merely to give the dimensions of this part of a Liberty ship. He testified, sitting in the witness chair with the plans of a Liberty ship in his hands. (Ap. 98). As he testified he measured off on the plans, or read the figures thereon, and, so testifying, he gave the dimensions as 18 feet from the after deckhouse to the bulwark rail, (Ap. 98), width of the deck 30 feet (Ap. 98), extension of the gun platform over the deck 10 feet (Ap. 99), and then was asked the question: "What is the headroom underneath the after gun deck platform?" And then, referring to the plans in his hand, and calculating aloud, he said:

"A. There should be absolute clearance of 7 feet, six eleven, 6 feet 11 inches.

Q. 6 feet 11 inches? A. Yes.

Q. The after gun deck platform is reenforced or strengthened, is it not, by a lateral angle iron?

A. Beams, yes, angle iron beams.

Q. How far do they extend downward from the gun deck platform proper? [90]

A. 6 inches.

Q. 6 inches. Now, when you say that the clearance is, did you say 7 feet?

A. 7 feet beneath those beams.

Q. That is what I was going to say, you mean the clearance is 7 feet beneath the beams?

A. Yes, sir."

Two things are perfectly apparent here. First: That Nyborg was using the word "should" in the conventional manner of a calculator, referring to plans, and computing in his head,—"thinking aloud" as the saying goes. Second: That he was referring only to the clearance between the channel irons and the deck itself, and not to any clearance between a suspended fog buoy and the deck; nor was he attempting to say what "the proper way to lash these beams was", or that the proper way was "to lash them in such a way that there would be a 7-foot clearance", as asked by the judge. He was not testifying about the beams at all, nor the proper way to lash them. Nor would he have been qualified to do so, not being a ship's officer, or even pretending to have had any experience at sea.

So, to sum this up, there is not in the whole record any statement of fact by any witness that this clearance of nearly 6 feet on an open deck was improper, and the judge's apparent assumption that there was such evi-

dence, and that it was "uncontradicted" is entirely a misapprehension.

WARNING

The other charge of negligence in the libel was that Wilhite was not "warned" of the "unsafe and unseaworthy position of said timber". (Ap. 4). Our answer to this is short. He knew the timber was there. He saw the life rings suspended from it. The only claim he makes is that he did not know it had been lowered. He should have known even that, since it would be extremely difficult, if not impossible, to suspend the life rings from the timber without lowering it. But whether he saw it, or should have seen it, is beside the point. The point is that a ship owes no duty to warn a seaman of a beam which, in its proper place, though slightly lowered, still leaves almost 6 feet of headroom to pass under; and that a seaman, in broad daylight, can be expected to walk under it safely.

SECOND SPECIFICATION OF ERROR

If the respondent was negligent, the trial court erred in not finding that the libelant was guilty of contributory negligence. (Third Assignment of Error, Ap. 19).

It is unnecessary to argue this. What we have already said, to show that respondent was not negligent, and that Wilhite carelessly and stupidly blundered into this beam without looking where he was going, has made

our point clear. If, in spite of what we have shown, this Court should feel that respondent was in anywise negligent, which, of course, we deny, then certainly it seems to us that Wilhite must be held to have been contributorily negligent. To hold the respondent at fault, and say that Wilhite was entirely without fault himself seems to us, on the face of the evidence, the clearest error.

The trial court himself was troubled about this. He realized it was one of the questions in the case, as witness his remarks on Pages 117, 119 and 120 of the Apostles. But he concluded against us on that point. And in drawing that conclusion we think he was clearly wrong. We shall not reargue it.

THIRD SPECIFICATION OF ERROR

The trial court erred in allowing libelant $2500 general damages, the same being excessive. (Second Assignment of Error, Ap. 19).

The trial court allowed Wilhite:

Four months' loss of wages, i.e., to the end of vessel's voyage	$ 670.00
Four months' maintenance and cure at $3.50 per day	420.00
General damages	2,500.00

It is the general damages, $2500, of which we now complain.

We review briefly what happened to libelant. He bumped the top, or "back" of his head. He staggered

and "the boys laughed at me", and though dazed, he continued on his errand and did his work at the anchor. (Ap. 51). Feeling dizzy, he went to his bunk, stayed there part of the time on the voyage on to Vancouver, B. C., had a headache, went to the hospital in Vancouver, B. C., got tired of staying there, didn't like it, and left. (Ap. 51 and 53). Came back to Portland, went to the Public Health, who told him to "lay around and keep quiet", (Ap. 54), and, according to the Abstract of Clinical Record, libelant's Exhibit 1 (which, however, we do not have before us) told him he would be fit to go back to work "in a week". (Ap. 114). He complained of some double vision and the Public Health sent him to Dr. Lucas, who examined his eyes and apparently gave him glasses. (Ap. 55). Over the next several months following his injury he had some headache "of a night", (Ap. 55), and he has a "dull feeling" and a "buzzing" which wakes him at at night. (Ap. 56). But "it is getting some better". (Ap. 57). And he said he couldn't do the work he used to do. That is the substance of his testimony.

Now three things stand out very prominently in the record. They are these:

1. The diagnosis of the United States Public Health Service in Portland was that he would be disabled "one week". *Libelant's counsel did not call these doctors to testify.*

2. The Public Health Service sent Wilhite to Dr. Lucas in Portland to examine his eyes for double vision. *Libelant's counsel did not call Dr. Lucas to testify.*

3. *The only doctor who testified was Dr. Raaf,* and he testified that Wilhite's symptoms *were not,* in his opinion, *the result of the injury.* (Ap. 91 and 93). And that they could result from the high blood pressure, which his tests showed Wilhite to have. (Ap. 92-93).

In the face of this, when there was no medical testimony *at all* that Wilhite's headache, dizziness, double vision, or what not, came from the injury, how could the court award $2500 damages?

CONCLUSION

When the court allowed Wilhite wages to the end of the voyage and maintenance for four months, it treated him very generously considering the one week's disability, which the Public Health allowed him, and considering Dr. Raaf's testimony. The award of $2500 general damages was unwarranted. We urge that the decree be modified accordingly.

Respectfully submitted,

HENRY L. HESS,
U. S. District Attorney,
VICTOR HARR,
Assistant U. S. Attorney,
U. S. Court House,
Portland, Oregon;

WOOD, MATTHIESSEN & WOOD,
ERSKINE WOOD,
ERSKINE B. WOOD,
LOFTON L. TATUM,
1310 Yeon Building,
Portland 4, Oregon,

Proctors for Appellant.